

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 834 of 2020

With

CRAN 1 of 2023

Sri Chhatar Singh Dugar & Ors.

Vs.

**Income Tax Officer under the office of the Principal Commissioner of Income
Tax-1, Kolkata**

For the Petitioners : Mr. Nirmalya Dasgupta,
Mr. Jitendra Patnaik.

For the Opposite Party/State : None.

Heard on : 05.06.2023

Judgment on : 19.06.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of Complaint Case No. CS/36744/19 under Section 200 of the Code of Criminal Procedure with charge under Section 276C (2) read with Section 278B of the Income Tax Act, 1961 and all orders passed therein including order dated 02.08.2019 passed by the learned Chief Metropolitan

Magistrate at Calcutta thereby taking cognizance and orders dated 28.08.2019, 19.11.2019, 13.12.2019 and 24.12.2019 passed by the learned Chief Metropolitan Magistrate, 16th Court at Calcutta, thereby issuing process against the petitioners.

2. The petitioners' case is that Vikash Metal and Power Limited (under liquidation) hereinafter referred to as the said company under liquidation was incorporated on 4th July, 1996 as a Public Limited Company under the provisions of the Companies Act, 1956 and engaged in the business of manufacturing of steel and power.
3. As per the master data of the Company as made available in the official website of the Ministry of Corporate Affairs, the registered office of the company under liquidation is at 35, Central Avenue, Kolkata – 700 012 under the Police Station, Bowbazar.
4. The petitioners along with Sri Kailash Chand Jain and Sri Vijay Kumar Jain were the directors of the said company (under liquidation).
5. The petitioner no. 1 herein is the accused person no. 3 in the Criminal Complaint case being no. CS/36744/2019, the petitioner no. 2 herein is the accused person no. 2, the petitioner no. 3 herein is the accused person no. 4 and the petitioner no. 4 herein is the accused person no. 5 in the said Criminal Complaint.
6. The respondent herein represented by an Income Tax Officer is the complainant in the Criminal Complaint case being no. CS/36744/2019.
7. That due to economic slowdown and other reasons the business of the said company (under liquidation) failed and consequent to which the company failed to honour the payments of its creditors.

8. On such failure of the said company (under liquidation), one M/s. Indian Carbon Limited initiated winding up proceedings in or about November, 2014 under Section 434 and 439 of the Companies Act, 1956 before this Hon'ble High Court. The said company petition being C.P. No. 985 of 2014 was taken up for hearing from time to time and necessary directions were passed accordingly.
9. **By an order dated September 8, 2015 in C.P. No. 985 of 2014 this Hon'ble High Court passed an order of winding up in accordance with the provisions of the Companies Act, 1956 and directed the Official Liquidator to take possession of all books, records, documents and assets of the said company and to take immediate control of its transactions.**
10. The respondent being the complainant lodged a complaint under Section 200 (a) of the Code of Criminal Procedure with charge under Section 276C (2) read with Section 278B of the Income Tax Act, 1961 against Vikash Metal and Power Limited (under liquidation), and the petitioners herein along with one Sri Kailash Chand Jain and Sri Vijay Kumar Jain, the other ex-directors of the said company.
11. The said complaint was filed in the month of August, 2019 before the Learned Chief Metropolitan Magistrate Court at Calcutta.
12. **The said Sri Kailash Chand Jain filed a discharge petition before the Metropolitan Magistrate, 16th Court at Calcutta on 24th December, 2019 which is pending as of now.**
13. From the materials on record the following facts are before this Court:-

- (i) It is stated that Vikash Metal and Power Limited (under liquidation), the Assessee has filed its income tax return for the Assessment Year 2010-11 on September 23, 2010;
- (ii) For the said Assessment Year, the assessment was completed in the regular course of action;
- (iii) However, the office of the Income Tax pursuant to the provisions of Section 144/147 of the Income Tax Act, 1961 ("Act") re-opened the said assessment for the said Assessment Year 2010-2011;
- (iv) The said assessment under Sections 144/147 of the Act was completed on September 14, 2017;
- (v) **On completion of the said assessment under Section 144/147, the respondent raised a demand of Rs.43,25,07,040/- on 14th September, 2017 by making an ex-parte addition of Rs.78,92,00,000/-;**
- (vi) The said demand of Rs.43,25,07,040/- was not paid by the said company (under liquidation) and therefore, the Income Tax department alleged that an offence under Section 276C(2) read with Section 278B of the Income Tax Act has been committed on and from 14th September, 2017;
- (vii) Since no payment was made by the said Company (under liquidation), the respondent assumed that on and from 14th September, 2017 there is willful attempt on the part of the said company (under liquidation) to evade payment of tax;

(viii) Further, the respondent alleged that under Section 179 of the Act since no payment was made by the said company (under liquidation), the Directors are liable to pay the tax of Rs.43,25,07,040/- as demanded by the respondent on such assessment under Sections 144/147 of the Act;

(ix) In view of the above, the respondent initiated criminal proceeding invoking the provisions of Section 276C(2) read with Section 279(1) of the Act against the said company (under liquidation), your petitioners and the said one Sri Kailash Chand Jain and Sri Vijay Kumar Jain;

14. It is stated that pursuant to the order dated September 8, 2015 passed by the Hon'ble Justice Sanjib Banerjee in C.P. No. 985 of 2014, the Official Liquidator ('OL') attached to this Hon'ble High Court pursuant to Rule 114 of the Companies (Court) Rules 1959 took possession of all the books, records, documents and assets and also took control of its transactions.

15. In the said order dated September 8, 2015 of this Hon'ble High Court, direction was issued to cause the said order to be advertised in the newspaper.

16. From the date of the order dated September 8, 2015, the Official Liquidator attached to this Hon'ble High Court is authorized and empowered to entertain any claim against the said company (under liquidation).

17. **Mr. Nirmalya Dasgupta, learned counsel for the petitioners** has submitted that the pursuant to the provisions of Section 446 of the Companies Act, 1956 (old Act) read with Rule 117 of the Companies (Court)

Rules 1959 and/or pursuant to the provisions of Section 279 of the Companies Act, 2013 (new Act), when a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced against the company, except with the leave of the Tribunal. The relevant portion of Section 279 (1) of the Companies Act, 2013 is quoted below :

“When a winding up order has been passed or provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose.”

18. Consequent to such order dated September 8, 2015 all the directors of the said company (under liquidation) who were the Directors as on September 8, 2015 ceased to be directors and as such none of the ex-directors are allowed and/or authorized to take any steps either with regard to receiving of any notice or to enter appearance before any hearing for and on behalf of the said company (under liquidation).
19. It is stated that from the date of passing of the order dated September 8, 2015, only the Official Liquidator attached to this Hon'ble Court is authorized and empowered to take any steps including receiving of any notice, to enter appearance before any court, forum, tribunal, officer or authority and to file any reply or written submissions for and on behalf of the said company (under liquidation).
20. From the complaint it appears that the Assessing Officer has re-opened and completed the assessment for the **assessment year 2010-11** on 14th September, 2017 and thereafter the said alleged demand notice was issued

to the said company (under liquidation) but not on the petitioners and/or upon any other ex-directors. Whereas, pursuant to the provisions of Sections 144/147 of the Income Tax, opportunity of being heard shall be given to the assessee before passing of any such order/assessment order. As such, without being any opportunity granted to the assessee/OL, the assessment order itself is bad in law, inter alia, rendering the demand and the demand notice bad.

21. It is further stated that from 8th September, 2015, pursuant to the order of this Hon'ble High Court in C.P. No. 985 of 2014, the Official Liquidator already took possession of the company and petitioners and other ex-directors are neither authorized nor have any documents to enter appearance before the Income Tax Authority. It is the Official Liquidator upon which any such notice of assessment and/or demand notice should have been issued and served by the respondent for assessment and/or for any claim against the said company (under liquidation). Petitioners state that under the provisions of the Companies Act, 1956 once the Official Liquidator is appointed, the ex-directors are not allowed to deal with/in any matter relating to the company (under liquidation). As such the demand notice and the show cause notice dated 1st February, 2019 issued by the respondent should have been served upon the Official Liquidator instead of issuing the same against Vikash Metal and Power Limited (under liquidation). The petitioners and the ex-directors are no more the principal officers of the said company (under liquidation) within the meaning of the principal officers as defined under the provisions of Companies Act as well as under Income Tax Act. As such they are neither liable to be prosecuted

nor liable to make any payment of any dues and/or demand of the department of Income Tax. In the above premises there is no question of any willful attempt in any manner whatsoever to evade payment of any tax on the part of the petitioners and/or Sri Kailash Chand Jain and Sri Vijay Kumar Jain, the other ex-directors.

22. That Vikash Metal and Power Limited (under liquidation) is a Public Limited Company and as such pursuant to the provisions of Section 179 of the Income Tax Act, 1961, the demand against a Public Limited Company shall not be recovered against its Directors. Hence, no proceedings can lie against the Directors or ex-Directors of a Public Limited Company, inter alia, against the petitioners and/or ex-directors. The relevant portion of Section 179 of the Income Tax Act, 1961 is reproduced below:-

“179. [(1)] *Notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.”*

23. The respondent has preferred the instant complaint before the Learned Chief Metropolitan Magistrate at Calcutta being Complaint Case No. CS/36744/19 under Section 276C(2) read with Section 278B of the Income Tax Act, 1961 on or about August 2, 2019, much after the order of winding up has been passed alleging that there has been a visibly willful attempt on the part of the assessee to evade tax and alleged that your petitioners and

one Sri Kailash Chand Jain and Sri Vijay Kumar Jain are liable to pay the tax demand raised against the Assessment Company.

24. The Learned Chief Metropolitan Magistrate, Calcutta vide order dated 02.08.2019 was pleased to take cognizance and transfer the case before the Learned 16th Metropolitan Magistrate, Calcutta.
25. Vide order dated 19.11.2019 the Learned Chief Metropolitan Magistrate, 16th Court, Calcutta was pleased to issue process against the petitioners herewith along with one Sri Kailash Chand Jain and Sri Vijay Kumar Jain.
26. From the complaint it is ample clear that the alleged offence under Section 276C(2) read with Section 278B has commenced to have been committed on and after 14th September, 2017.
27. In the above circumstances there is no question of willful default on the part of the petitioners or on behalf of any ex-directors or to evade payment of tax as alleged by the respondent in its Complaint Case No. CS/36744/19.
28. **That the department of Income Tax has completed the assessment for Assessment Year 2010-11 by re-opening under Section 144/147 of the Income Tax, 1961, only on 14th September, 2017, after lapse of 7 (Seven) years.**
29. At the time of assessment for the Assessment Year 2010-11 under Section 144/147 of the Income Tax Act no opportunity of being heard was given as required under the provisions of the said Section 144/147. As such the assessment order passed and the demand raised thereupon are bad in law.

30. The respondent has not obtained any leave of the Tribunal as provided under Section 279 of the Companies Act, 2013 to initiate proceedings against the said Company (under liquidation).
31. There is no willful attempt in any manner whatsoever to evade payment of tax on the part of the petitioners or on part of any ex-directors as provided under Sections 276C(2) of the Income Tax Act, 1961.
32. The respondent department should have filed the complaint, if any against the Official Liquidator attached to this Hon'ble High Court for non appearance and/or non filing of written submissions with the department of Income Tax.
33. Since on and from September 8, 2015 the Official Liquidator is the whole and sole of Vikash Metal and Power Limited (under liquidation) there is no question of willful default on the part of the petitioners or to evade payment of tax as alleged by the respondent in its Complaint Case no. CS/39744/19.
34. Since the petitioners no more represent Vikash Metal and Power Limited (under liquidation), the continuation of the instant proceedings against them is an abuse of the process of law and/or to be quashed in the interest of justice.
35. In spite of due service there is no representation on behalf of the opposite party, Income Tax Authorities.
36. **From the materials on record the following facts are before this Court:-**

(a) **Vide order dated September 8, 2015 in C.P. No. 985 of 2014, the High Court passed the following order:-**

*“.....The company, Vikash Metal & Power Limited, **is wound up** in accordance with the provisions of the Companies Act, 1956. The official liquidator will forthwith take possession of all books, records, documents and assets of the company now in liquidation and take immediate control of its transactions.....”*

- (b) The petition of complaint, filed on 2nd August, 2019 before the learned Chief Metropolitan Magistrate, Calcutta, is against the said company, its Directors and the petitioners herein.
- (c) In paragraph 4 of the petition of complaint, it has been stated that the assessee company filed its return of income for the AY 2010-11 electronically on 23.09.2010 disclosing a total income of Rs.(-) 44,85,985/- Assessment U/s 144/147 of the IT Act, 1961 was completed on 14.09.2017 raising a **demand of Rs.43,25,07,040/- making an addition of Rs.78,92,00,000/-**. There has not been any payment of the outstanding tax demand till date. Thus there has been a visibly willful attempt on the part of the assessee to evade tax as the Directors Sri Akash Patni of 227/1A, AJC Bose Road, Kolkata-700020, Sri Chattar Singh Dugar of Flat-3C 5, S.R. Das Road, 227/1A, AJC Bose Road, Kolkata-700020, Sri Vimal Kr. Patni of 227/1A, AJC Bose Road Kolkata-700020, Sri Vikash Patani of 227/1A, AJC Bose Road, Kolkata-700033, and Sri Kailash Chand Jain of Rajhans, 6, Hastings Park Road, Kolkata-700027 are to be held liable

U/s 179 of the Income Tax Act, 1961 to pay the Tax Demand raised against the Assessee Company.

(d) In the order dated 22.02.2022 in the present revision, the Court recorded that “it has been submitted that Income Tax Authorities were never aware regarding the order dated September 08, 2015.” The opposite party then sought to file affidavit-in-opposition.

37. Brief notes of argument has been filed by the petitioners.

38. **Section 178 of the Companies Act is reproduced here:-**

“178. (1) Every person –

(a) who is the liquidator of any company which is being wound up whether under the orders of a court or otherwise’ or

(b) who has been appointed the receiver of any assets of a company; (hereinafter referred to as the liquidator) shall, within thirty days after he has become such liquidator, give notice of his appointment as such to the Income-tax Officer who is entitled to assess the income of the company.

(2) The Income-tax Officer shall, after making such enquiries of calling for such information as he may deem fit, notify to the liquidator within three months from the date on which he receives notice of the appointment of the liquidator the amount which, in the opinion of the Income-tax Officer, would be sufficient to provide for any tax which is then, or is likely thereafter to become, payable by the company-

(3) The liquidator –

(a) shall not, without the leave of the Commissioner, part with any of the assets of the company or the properties in his hands until he has been notified by the Income-tax Officer under sub-section (2); and

(b) on being so notified, shall set aside an amount, equal to the amount notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands:

Provided that nothing contained in this sub-section shall debar the liquidator from parting with such assets or properties for the purpose of the payment of the tax payable by the company or for making any payment to secured

creditors whose debts are entitled under law to priority of payment over debts due to Government on the date of liquidation or for meeting such cost and expenses of the winding up of the company as are in the opinion of the Commissioner reasonable.

(4) If the liquidator fails to give the notice in accordance with sub-section (1) or fails to set aside the amount as required by sub-section (3) or parts with any of the assets of the company or the properties in his hands in contravention of the provisions of that sub-section, he shall be personally liable for the payment of the tax which the company would be liable to pay:

Provided that if the amount of any tax payable by the company is notified under sub-section (2), the personal liability of the liquidator under this sub-section shall be to the extent of such amount.]

(5) Where there are more liquidators than one, the obligations and liabilities attached to the liquidator under this section shall attach to all the liquidators jointly and severally.

(6) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.”

“When a company goes into liquidation, the liquidator may investigate the company’s historical affairs. The liquidator may then take action against the directors if they were involved in insolvent trading, uncommercial transactions, or have loans due and owing to the company. The recovery proceedings against the directors can result in personal bankruptcy.

The general rule during a company liquidation (either voluntary or compulsory) is the directors are not liable to company debts. However, there are a few exceptions to this rule. Directors can be held liable for debts in certain circumstances.

Some of the situations where directors may be held liable for debts include:

- If the director has given a personal guarantee to a company debt.
- If the director has been found to have engaged in insolvent trading because they knew (or should have known) the company was insolvent.
- If the director has breached their duties owed to the business or its creditors.

Once a company is placed into liquidation, the director’s powers are removed. They cannot make business decisions or access the company’s finances. **Their role becomes one of assisting the liquidator in winding up the company’s affairs. This typically involves helping**

to locate and sell off assets, as well as liaising with creditors.”

39. **It is the case of the petitioners** that since the Hon’ble Court has directed the winding up of the company on 08.09.2015, everything related to the company is now in the custody of the official liquidator and as such the petitioners have no liability nor responsibility in respect of the affairs of the company. The proceedings against them should thus be quashed.
40. **The total outstanding tax is Rs. 43,25,07,040, making an addition of Rs. 78,92,00,000/-.**
41. The Income Tax Authorities admitted before this Court that they did not have knowledge of the winding up order dated 08.09.2015 and filed this case on 02.08.2019.
42. Admittedly, considering the present situation, **the official liquidator is a necessary party before the trial court.** Though the official liquidator is now in-charge of the affairs of the company, the petitioners being the erstwhile directors are to **assist the official liquidator in affairs of the company** even after winding up.
43. The petitioners’ relief on grounds stated thus lies in praying for discharge before the trial court, which the Court is to consider in accordance with law, on adding the official liquidator as a party to the case, first and then consider the prayer for discharge if any. Accused Kailash Chand Jain’s petition praying for discharge dated 24.12.2019 is still pending before the Metropolitan Magistrate, Calcutta.
44. **The revisional application being CRR 834 of 2020 is accordingly dismissed.**

45. The learned Magistrate to proceed expeditiously with the case as per observation in the body of this judgment, but not being influenced by them.
46. No order as to costs.
47. All connected applications, if any, stands disposed of.
48. Interim order, if any, stands vacated.
49. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.
50. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)